Willamette Industries, Inc. and Graphic Communications Union Local 17-M, a/w Graphic Communications International Union, AFL-CIO. Case 25-CA-25290

June 29, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND BRAME

On June 2, 1998, Administrative Law Judge C. Richard Miserendino issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, ¹ and conclusions and to adopt the recommended Order as modified.²

The judge found, inter alia, that on March 3, 1997,³ the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union, which had represented the production and maintenance employees at the Respondent's plant since 1979. Since March, the Respondent has refused to meet with the Union to negotiate a renewal contract, and it cancelled the bargaining session that had been scheduled to commence during the week of March 10 before the parties' old contract was due to expire on March 15.4 In its defense, the Respondent argues that it had no bargaining obligation because it had a good-faith doubt concerning the Union's continued majority status, based on a 35-35 tally of ballots that was previously issued in a Board decertification election held among the unit employees on February 7. The Union filed timely objections to the election, and a hearing on those objections was held on March 14. Two weeks later, the hearing officer issued his report, finding that

the Respondent had engaged in objectionable conduct on January 7 and 23 by conditioning the grant of a 401(k) plan benefit to employees on union decertification, and he recommended that the election be set aside and a new election be ordered. Shortly thereafter, the Respondent waived its right to appeal the hearing officer's report. It signed a written waiver statement and a Stipulated Election Agreement on or before April 3.⁵ Subsequently, by a pro forma order dated April 18, the Board adopted the hearing officer's recommendations and set aside the February 7 election.⁶

It is well established that a union is entitled to a conclusive presumption of majority status during a collective-bargaining agreement's term up to 3 years. On the expiration of the agreement, the employer may rebut the presumption of continued majority status by showing that, at the time of its refusal to bargain with the union, either (1) the union did not in fact enjoy majority support or (2) the employer has a good-faith doubt concerning the union's majority status. See NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 778 (1990). We agree with the judge that the Respondent did not meet either requirement when it cancelled the March bargaining session and refused to meet with the Union to negotiate a new contract. However, we rely on the following reasoning in finding no good-faith doubt concerning the Union's majority status.

The sole basis for the Respondent's refusal to bargain is the tie vote tally in the decertification election. Here, the Respondent voluntarily waived its right to appeal the hearing officer's findings and recommendation to set aside the election results based on conduct found to be objectionable. Given this waiver, the results of the tally of ballots stood tainted by the Respondent's own objectionable conduct in conditioning the grant of an important 401(k) benefit to employees just a few weeks before the election, and thus the election results could not serve as a valid indicator of employee sentiment.⁷ Accord-

¹ The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge found, inter alia, no violation of the Act based on statements made by James Mertes, the Respondent's regional personnel manager, during employee meetings held on January 7, 1997. In adopting this finding, we find it unnecessary to rely on the judge's discussion of hearsay in fn. 11 of his decision. Instead, we rely only on the judge's discrediting of Jeffrey Garmon's testimony attributing certain remarks to Terry Beavers and responses to Mertes.

² We have modified the judge's recommended Order to delete his references to Case 25–RD–1279. That decertification case was not a part of the instant unfair labor practice proceedings and therefore is not before us for resolution.

³ All dates are in 1997 unless otherwise indicated.

⁴ However, as found by the judge, the Respondent has continued to give effect to that contract after March 15, 1997, and it has never withdrawn recognition from the Union.

⁵ The judge found that neither the Respondent's waiver statement nor the Stipulated Election Agreement constituted any showing of a waiver by the Union of the Respondent's obligation to bargain, or a showing that the Union no longer represented a majority of the unit employees.

⁶ In view of the instant 8(a)(5) charge, a second election was never held. On June 4, the Regional Director dismissed the decertification petition, subject to reinstatement by the Petitioner on final disposition of this case.

⁷ The Board in *General Shoe Corp.*, 77 NLRB 124 (1948), stated:

An election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammeled choice for or against a bargaining representative. . . . In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.

ingly, we find that the Respondent violated Section 8(a)(5) and (1) of the Act.⁸

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Willamette Industries, Inc., Indianapolis, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified. Delete the last paragraph of the recommended Order that directs the Regional Director to reinstate all prior proceedings and conduct a rerun election in Case 25–RD–1279.

Miriam C. Delgado, Esq., for the General Counsel.

Jack H. Rogers, Esq., of Indianapolis, Indiana, for the Respondent.

William R. Groth, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

C. RICHARD MISERENDINO, Administrative Law Judge. This case was tried in Indianapolis, Indiana, on June 30 and July 1, 1997. The charge was filed on April 8, 1997, and was amended on May 20, 1997. A complaint and notice of hearing were issued on June 4, and the complaint was amended on June 20. The complaint, as amended, alleges that the Respondent violated Section 8(a)(5) of the Act on December 5, 1996, and on certain dates thereafter, by failing and refusing to bargain with the Union, and on March 5, 1997, by withdrawing recognition from the Union as the exclusive bargaining representative of an appropriate bargaining unit. The complaint further alleges that the Respondent violated Section 8(a)(1) of the Act on January 7 and 23, 1997, when its Regional Personnel Manager James Mertes, impliedly informed the employees at captive audience meetings that they would not receive a 401(k) plan, if they voted for the Union in a decertification election, and impliedly promised that they would receive such a plan, if they voted against the Union. Finally, the complaint alleges that the Respondent violated Section 8(a)(1) of the Act by informing its employees by memorandums, dated February 7 and 18, 1997, that they would not receive wage increases and other benefits if they supported the Union, but that they would receive wage increases and other benefits, if they did not support the Union.

Respondent's timely answers denied the material allegations of the complaint, as amended. The parties have been afforded a

⁸ In finding this violation, the judge applied the reasoning of *W. A. Krueger*, 299 NLRB 914, 915 (1990). In that case, the employer made unilateral changes in employees' wages and terms and conditions of employment after the union had lost a decertification election but before the Board had overruled the union's election objections and issued the certification of results decertifying the union. The Board held that the employer violated its 8(a)(5) obligation to bargain with the employees' bargaining representative until a final determination is made that the union is no longer the representative. Here, the February 7 election results were vacated, and no certification decertifying the Union issued. Thus, this is even a stronger case than *W. A. Krueger* for finding the violation.

Member Brame finds W. A. Krueger inapposite because that case was predicated on the prior issuance of a certification of results decertifying the union.

full opportunity to appear, present evidence, examine and cross-examine witnesses, and file briefs.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is engaged in the production and distribution of continuous business forms at its facility in Indianapolis, Indiana, where it annually purchases and receives goods valued in excess of \$50,000 directly from points outside the State of Indiana. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Graphic Communications Union Local 17-M, a/w Graphic Communications International Union, AFL—CIO (Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICE

A. Background

Since at least 1979, the Union has been the exclusive collective-bargaining representative of the Respondent's employees, located in Indianapolis, Indiana, in the following unit:

All production and maintenance employees, truck drivers, warehouseand all other employees employed by the Respondent at its Indianapolis, Indiana facility; BUT EXCLUDING all office clerical employees, professionals guards, and supervisors as defined in the Act.

This recognition has been embodied in successive collective-bargaining agreements for the Indianapolis plant, the most recent of which was effective by its terms for the period March 16, 1994, to March 15, 1997.

On December 5, 1996, the Respondent and Union set aside the week of March 10, 1997, to negotiate a renewal contract. Two weeks later, on December 20, 1996, employee James Fanning filed a decertification petition. The decertification election was held on February 7, 1997. The Union did not receive a majority of the valid votes cast. On February 13, the Union filed objections to the conduct of the election and a hearing was conducted. On March 28, the hearing officer recommended that the election be set aside and that a second election be ordered.

In the interim, and more specifically on March 3, 1997, the Union requested to begin negotiating a renewal contract. The Respondent declined to begin bargaining and asserted that it had a good faith doubt that the Union represented a majority of the employees based on the results of the February 7 decertification election. However, in an effort to expedite a rerun election, the Respondent offered to waive its right to file exceptions to the hearing officer's recommendations in exchange for a Stipulated Election Agreement. All parties signed a waiver and Stipulated Election Agreement on or about April 7. The next day, April 8, the Union filed the underlying unfair labor practice charge blocking the election, which had been scheduled for April 18. Subsequently, a pro forma Board Order issued on

¹ The hearing officer concluded that the Respondent engaged in objectionable conduct on January 7 and 23, 1997, by telling and demonstrating to employees in captive audience meetings that the only circumstances in which a 401(k) plan would be granted would be by decertifying the Union.

April 18, adopting the hearing officer's recommendations and setting aside the election of February 7.² On June 4, the Regional Director issued a complaint and dismissed the decertification petition, without prejudice to reinstatement, pending the outcome of this case. A subsequent request to begin negotiations made by the Union on June 9, 1997, was likewise rejected by the Respondent, which continues to assert that it has a goodfaith doubt as to the Union's majority status, pending the final disposition of the complaint.

The primary issues are whether the Respondent (1) unlawfully refused to bargain with the Union on December 5 and 12, 1996; (2) impliedly promised its employees on January 7 and 23, 1997, that if they voted against the Union in the upcoming decertification election they would receive a 401(k) plan, and impliedly threatened that they would not receive such a plan, if they voted for the Union; (3) unlawfully refused to bargain with the Union on March 3, 1997, and on various dates thereafter; (4) unlawfully withdrew recognition from the Union on March 5, 1997; and (5) unlawfully promised to confer wage increases and benefits on its employees if they ceased supporting the Union and unlawfully threatened to withhold granting wage increases and benefits, if they supported the Union. As to the remedy, if any, the issue is whether a "Gissel" bargaining order is warranted under the circumstances of the case.

B. The Alleged Refusal to Bargain on December 5 and 12, 1996

1. The December 5 meeting

On December 5, 1996, the Respondent and Union met and settled an arbitration case. Present were the Respondent's regional prsonnel manager James Mertes, Indianapolis Plant Manager Greg Smith, Union President Michael Huggins, Union Shop Steward Mark Howard, and Union Attorney William Groth. Huggins testified that while having a cup of coffee and waiting for the arbitrator to arrive, he asked Mertes if he had some dates available for the 1997 contract negotiations. The credible evidence shows that Mertes looked at his daytimer, and told Huggins that he had set aside the week of March 10 for negotiations. Huggins told Mertes that he thought that was "kind of late" to start negotiations, but Mertes said that was the only time he had available. As Mertes explained, "I chose March 10th because I had several other things to do in January. February and early March. I did not anticipate any problems. That gave us five days to negotiate before the end of the contract, which is just as many days as we had negotiated in 1994 – yes, 1994, before the end of the contract. And I preferred setting aside a week instead of doing it in one-day chunks." (Tr. 22.) The evidence establishes that after Mertes told Huggins that was all he had available, the conversation ended.

At the trial, Huggins denied that he agreed to begin negotiations on March 10, and sought to foster the impression that he strongly objected to starting on that date. Huggins testified, "I told him [Mertes] that we started earlier [for the prior contract] and that I didn't agree to those dates. I didn't write them down or anything I didn't agree to them at all. He told me that is what he had available." (Tr. 72.) The General Counsel argues that, in effect, Mertes presented the Union with a "take it or leave it" proposition on December 5, which constitutes an

unlawful refusal to bargain. I am not persuaded by the argument for several reasons.

First, the evidence does not establish that the Union made a specific demand to begin negotiations on a specific date. Although Huggins inquired as to what dates Mertes had available, the evidence shows that neither he, nor Union Attorney Groth, nor Union Shop Steward Howard, all of whom were present on December 5, insisted on starting negotiations earlier or offered any earlier alternative dates. Next, for demeanor, and other reasons, I do not credit Huggins' testimony. Union Shop Steward Howard, who testified at the hearing, did not corroborate Huggins' testimony and, contrary to Huggins' assertions, there was no significant difference between the proposed date for starting the 1997 negotiations (i.e., March 10, 1997) and the actual start date for the 1994 negotiations (February 22, 1994). Even though the 1994 negotiations began 18 days earlier, the first four negotiation sessions (February 22 and 28 and March 1 and 4, 1994) were relatively short and did not cover much substance. The evidence reflects that substantive bargaining actually began on March 10, 1994, and thereafter took place on a sporadic basis until a contract was reached on May 3, 1994.³

The General Counsel nevertheless likens this case to *Sparks Nugget, Inc.*, 298 NLRB 524 (1990), enfd. in part, denied in part, *Sparks Nugget, Inc.*, 968 F.2d 991 (9th Cir. 1992). There, the Board found that the employer had engaged in bad faith bargaining in violation of the Act by refusing to budge from an initial bargaining position, by refusing to offer an explanation for its bargaining proposals, and by refusing to make efforts to compromise in order to reach a common ground. In addition to this litany of unlawful conduct at the bargaining table, the Board noted that the employer from the outset had impeded the likelihood of reaching an agreement by refusing to meet regularly with the Union, by restricting the lengths of the meetings, and by declining, without reason, to respond positively to the Union's follow-up offer to adjust the negotiating schedule to suit the employer's convenience.

Relying on solely on the latter aspect of the case, the General Counsel argues that the Respondent here has likewise violated the Act. I do not agree. In *Sparks Nugget, Inc.*, unlike here, the Board concluded that the employer had no real intent to reach a collective-bargaining agreement based on several significant manifestations of bad-faith bargaining at the bargaining table. In this case, there is no elongated pattern of unlawful conduct at the bargaining table. Rather, the alleged unlawful conduct took place away from the bargaining table and is limited to a refusal to bargain based on the Respondent's alleged good-faith doubt of the Union's continued majority status. Also, the evidence shows that in this case Mertes wanted to set aside a block of time for negotiations, rather than to proceed in a piecemeal fashion, which is opposite of what the employer in *Sparks Nugget, Inc.* insisted on doing. I therefore find that *Sparks Nugget, Inc.* inapposite.

In addition, the General Counsel argues that Mertes unlawfully delayed the start of negotiations on purpose because he

² Because no exceptions to the hearing officer's report were filed, the Board never reviewed the merits of the objections or the hearing officer's factual findings.

³ Art. 35 of the extant collective-bargaining agreement provides that if the parties have not reached an agreement before the contract expiration date, the terms of the contract will continue in effect until either party gives 30 days' written notice of its intent to terminate the contract. The evidence shows that in 1994, the contract continued in full force by its terms until a new agreement was reached. Thus, the prior bargaining history dispels any notion that it was imperative to begin negotiations sooner than March 10.

had heard rumors that a decertification petition was circulating. In this connection, the General Counsel points out that as early as June 1996, leadman, James Wright, was talking to employees about decertification, and in July or August 1996, employee, Ben Gamble, asked Union Shop Steward Howard about the rumors being circulated. The General Counsel asserts that Mertes knew, or should have known, about the decertification rumors because the Respondent employs the wife of the employee, who filed the decertification petition, as a customer service manager in its Indianapolis business office.

But the evidence here does not show that the start of negotiations was unreasonably delayed, which makes the underlying premise faulty. Rather, the evidence shows that the 1997 negotiations were scheduled to begin within the same general timeframe as the 1994 negotiations. Also, the evidence does not establish with any specificity what, if anything, Mertes knew about the decertification rumors and, if he did know something, when he came to know it. I decline to impute to Mertes any knowledge of the decertification rumors based on the fact that the wife of the employee who filed the decertification petition was employed by the Respondent as a customer service manager at a location within the Indianapolis vicinity at other than the Indianapolis plant.

And even if Mertes had heard the rumors, the evidence shows that the Respondent was preparing for negotiations as it had always done. The undisputed evidence establishes that in June 1996, Mertes called Huggins to ask him if he would agree to extend the contract, which Huggins declined to do. In October 1996, Mertes sent Plant Manager Smith a prenegotiation plan, which required his input in order to help Mertes prepare for the up coming contract negotiations. And unlike the previous contract negotiations, where Mertes did not contact the Union until January 12, 1994, to "propose meeting on February 22 to exchange agendas" and to establish additional dates for future sessions (G.C. Exh. 3), the evidence shows that he orally agreed to begin negotiations the week of March 10, which actually placed the parties a month ahead of the 1994 scheduling process.

Thus, the evidence shows that in a casual conversation, Huggins in the presence of the Union's attorney and Union Shop Steward, asked Mertes for dates to begin negotiations, and after Mertes told him what he had available, Huggins expressed some reservations, and that ended the discussion. The Union did not make a specific demand to begin bargaining on a specific date and the Respondent did not delay beginning negotiations. Accordingly, I shall recommend that the allegations of paragraphs 7(a) and (b) and 10 of the complaint as they pertain to December 5, 1996, be dismissed.

2. The letter of December 12, 1996

On December 12, 1996, Union President Huggins sent Plant Manager Smith a letter, which states:

This letter is to advise you that the contract between Willamette Industries, Inc., Indianapolis Business Forms Plant and Graphic Communications Union Local 17M expires on March 15, 1997. The Local hereby requests a meeting with you at a mutually convenient time for the purpose of negotiating a new collective-bargaining agreement.

The evidence establishes that on receiving the letter, Smith filed it, without informing Mertes, and without responding.

The General Counsel takes the position that the letter was a renewed demand for bargaining and that the failure to respond to the letter is further proof of the Respondent's unlawful refusal to bargain. I do not agree. The evidence shows that by the terms of the contract, Huggins was required to send the letter in order to initiate negotiations. Article 35 of the parties' collective-bargaining agreement provides that a party seeking to terminate, modify, or amend the agreement must give 60 days' written notice to the other party. Otherwise the contract will automatically renew for a 1-year period. In his testimony, Huggins acknowledged that this contractual requirement had to be met.

In addition, a plain reading of the December 12 letter supports a reasonable inference that the letter served no other purpose than to comply with terms of the contract. The letter does not insist on beginning negotiations sooner than March 10 or offer any earlier alternative dates. All the letter states is that the contract expires on March 15, 1997 (which is something that everyone already knew) and that the Union wanted to meet for negotiations at a mutually convenient time.

Moreover, Smith offered a plausible explanation of why he did not respond. He testified that he filed the letter without responding because only a week earlier he, Mertes, and Huggins met for an arbitration case at which time negotiations were scheduled to begin on March 10, 1997. He therefore did not see the need to respond.

Finally, Huggins' conduct subsequent to sending the December 12 letter supports a reasonable inference that he did not attach any special significance to it. Almost 2 months passed before Huggins brought up the subject of negotiations again. By letter to Smith, dated March 3, 1997, he reminded Smith that in early December 1996, Mertes had set aside the week of March 10 for negotiations and he confirmed that he was available to begin negotiating at that time. (G.C. Exh. 10.) In the interim, Huggins had not said or done anything about starting negotiations sooner. In an attempt to explain his inactivity, Huggins testified:

Mr. Mertes made it pretty clear that March 10th was the week he had set aside to bargain and no other week and in the meantime the decertification petition was filed. That was ongoing and with representation of the other local plants, things just move on, so—[Tr. 63.]

I therefore find that the December 12 letter was not a renewed demand for bargaining. It was a pro forma notification required by the contract to begin negotiations. I further find that at the December 5 meeting, Huggins accepted March 10, 1997, as the start date for negotiations and did not think any more of it. Accordingly, I shall recommend that the allegations in paragraph 7(a) and (b) and 10 of the complaint as they pertain to December 12, 1996, be dismissed.

C. The Captive Audience Meetings

1. The hearing officer's report

As a preliminary matter it should be pointed out that the allegations contained in paragraphs 5(a)(i) and (ii) of the complaint are similar to objections 2 and 5 to the conduct of the February 7 election, which were considered and decided by the hearing officer on March 28, 1997. The General Counsel points out that the hearing officer concluded that on January 7 and 23, 1997, the Respondent "engaged in objectionable conduct by telling and demonstrating to employees that the only circumstances in which a 401(k) plan would be granted would be upon the decertification of the Union." (G.C. Exh. 12, at 5.) Implic-

itly the General Counsel asserts that the hearing officer's factual findings and conclusion should be binding on the outcome of these proceedings. I do not agree. 4 "It is well settled that the Board's findings and conclusions with respect to conduct alleged as objectionable in a representation proceeding are not binding upon the [Administrative Law Judge] in a subsequent hearing where such conduct is alleged as an unfair labor practice, since the issues are different in the two types of proceedings." Helena Laboratories Corp., 225 NLRB 257, 257 (1976), citing cases in fn. 6. See also St. Francis Hospital, 263 NLRB 834, 839 fn. 3 (1982). In addition, the record before me is different from the hearing officer's record. The hearing officer's report reflects that the witnesses in the representation case⁵ were not entirely the same as the witnesses in this case. Therefore, some of the testimony relied on by the hearing officer. particularly in making credibility determinations, is not before me and vice versa, which in part may explain why my factual findings are different from those of the hearing officer. Accordingly, I decline to adopt the factual findings and conclusion of the hearing officer and instead I will determine the validity of the allegations in the complaint based on the evidence adduced at the hearing before me.

2. The January 7, 1997 meetings

On January 7, 1997, Mertes spoke to the Indianapolis plant employees at the end of each of three shifts. Using the same outline for all three meetings, he explained that a petition had been filed for an election to decertify the Union. He told the employees that he was not going to disparage the Union; rather, his comments would be procompany based on fact. Mertes stated that he could not make any promises because it would be illegal to do so. He talked about the decertification process and explained how it worked. He also told the employees that all nonunion plants had employee handbooks that explained their benefits. He gave an overview of the benefits available to employees in nonunion plants, including a 401(k) plan.8 He said that he was aware of two instances in which a plant went from union to nonunion, i.e., Huntsville, Alabama, and Lincoln, Illinois, and that he could answer questions about the Lincoln plant because it was in his region. Mertes then responded to questions from the employees.

a. The 6 a.m. meeting

Employee Jeffrey Garmon attended the 6 a.m. meeting. He testified that when an employee named Don Bollinger asked, "why don't we have a 401(k) plan like the nonunion plants," another employee, Terry Beavers, interrupted Mertes before he could answer the question. In a loud voice, Beavers purportedly said, "I' ll tell you what he said to me in negotiations, that no union plant has the 401(k) plan and no union plant ever will have the 401(k) plan." (Tr. 99.) Garmon testified that upon hearing that, he asked Mertes if that is what he said and Mertes said, "yes." Garmon testified that at that point, someone else asked Mertes why the company had taken that position, and Mertes stated that it was against company policy for a union plant to have a 401(k) plan because it did not want to have a third party telling it how to invest money in different plans. Someone else then asked "what if we get it in the contract," to which Mertes replied, "Well, everything is negotiable, but it has never been asked for." Beavers, who was on the 1994 union negotiating team, disagreed, stating that it had been asked for.

Mertes specifically denied ever saying that it was against Company or corporate policy to have a 401(k) in a union plant. He recalled the dialogue altogether differently. He testified that when someone asked if union plants had a 401(k) plan, Terry Beavers interrupted him before he could answer, stating "I can tell you what he said to me in negotiations . . . no union plant has the 401(k)." (Tr. 98.) Mertes testified that he eventually answered the question by telling the employees that it was not negotiated in the 1988 and 1994 contract negotiations, because it was the Company's position that it did not want to confront the possibility of administering 60 different 401(k) plans and that it did not want to negotiate investments with a third party.

Plant Manager Smith, who attended all three meetings on January 7, testified that Mertes never said that he would not negotiate a 401(k) plan in a union plant. Smith stated emphatically that Mertes never said that it was against corporate policy to have a 401(k) plan at union plants or anything like that. His testimony, and to a certain extent Mertes' testimony, was corroborated by press operator Russell Phelps, who attended the same meeting. Phelps stated that he does not recall Mertes saying that it was against corporate policy to have a 401(k) plan at a unionized plant and that the topic of corporate policy never came up.

b. The 3 p.m. meeting

The evidence shows that Mertes made the same opening presentation at the 3 p.m. meeting and then took questions from the employees. Former Union Representative Mark Francis, who attended that meeting, testified that when a press operator named Dave Nealy asked Mertes why unionized employees did not have a 401(k) plan, Mertes said that "it was corporate policy that union shops do not get a 401(k) and probably never will have it because they didn't want third party involvement." (Tr. 124.) He also recalled that someone asked Mertes if there was ever a nonunion plant that kept its 401(k) plan after it went union, and Mertes responded that the "benefit was eliminated from their contract." However, when Francis was asked on cross-examination, if he heard Mertes say anything about negotiations, he responded, "All I heard him say about negotiations is that the 401(k) was a negotiable item." (Tr. 131.)

⁴ While I am not bound by the hearing officer's factual findings and conclusion, for the reasons stated infra, I am bound by the conclusiveness of the Board's Order issued on April 18, invalidating the first election and ordering a second election.

⁵ No portion of the transcript in the representation case was introduced or offered into evidence in this proceeding.

 $^{^6}$ The testimony at the hearing focused, by and large, on comments made at the 6 a.m. and 3 p.m. meetings.

⁷ The General Counsel argues that the Respondent's failure to introduce a copy of the outline into evidence warrants an adverse inference that it would not have supported Mertes' testimony. I decline to draw such an inference. The evidence does not show that the alleged violation arose in the context of comments made by Mertes in his prepared introductory remarks. Rather, the evidence shows that the allegations of implied threats and implied promises arose in the course of responding to questions from the employees, which would not necessarily have been contained in a prepared outline.

⁸ The evidence reflects that the Indianapolis plant employees were particularly interested in a 401(k) plan, which the Union had unsuccessfully attempted to obtain in the 1988 and 1994 collective-bargaining negotiations.

Union Shop Steward Mark Howard also attended the 3 p.m. meeting. He testified that he asked Mertes if there were any plants that had organized recently. Howard testified that Mertes spoke of a plant in Kentucky that participated in a 401(k) plan before it unionized. He testified that Mertes stated that after going union the plant no longer had a 401(k) plan because it was not negotiated into the contract. He also testified that when someone asked Mertes why the Indianapolis plant did not have a 401(k) plan, Mertes said because it had not been negotiated. Howard testified that he then spoke up and said, "I beg your pardon. I was on the last two negotiating committees and it was negotiated or asked for both times." (Tr. 147.) According to Howard, Mertes responded "well, you know how negotiations work. It is a give and take process. You know the Union gets a little and gives a little." (Tr. 147.) Howard said that he also pointed out to Mertes that the Union asked for a unionsponsored plan in the 1988 negotiations, but that the Respondent opposed the proposal because it did not want to get involved with a third party.

Howard also recalled that a press operator named Nealy asked why the Indianapolis plant was being punished for being union by not being allowed to participate in a 401(k) plan. According to Howard, Mertes said that they were not being punished: that it was corporate policy not to allow a union plant to participate in a 401(k) plan. Howard testified that when someone in the back of the room asked, "if we decertify, will we receive a 401(k)," Mertes responded, "I can't make no promises, all I can say is that all our nonunion plants have 401(k)s." (Tr. 148.)

Plant Manager Smith testified that when Nealy asked why the Indianapolis plant was being punished for being union, Mertes responded, "you're not being punished. It just has not been negotiated." (Tr. 222.) His testimony was corroborated by Nealy, himself, who testified that when he asked "were we being penalized for being Union because we didn't get a 401(k)," Mertes responded, "no, that it has to be negotiated in to your contract." (Tr. 246.) Nealy testified that Mertes did not make any reference to corporate policy nor did he say that it was against corporate policy to have a 401(k) plan in a unionized plan. He remembered Mertes saying something about third-party involvement, but did not remember exactly what was said. And he remembered Mertes repeatedly saying that he could not promise anything. I find Smith and Nealy to be a credible witnesses. Based on their credible testimonies, I find that Mertes did not make any reference to a corporate policy or company policy against having a 401(k) plan at a union plant.

Another employee, William Tolsen, attended the same meeting on January 7. He testified that several questions were asked about the 401(k) plan, but he could not remember many specifics. He did recall that when someone asked why the Indianapolis plant did not have a 401(k) plan, Mertes responded that it had not been negotiated in the contract. (Tr. 258.) He denied that Mertes said anything about corporate policy or that it was company policy not to have a 401(k) plan in the contract. Tol-

sen stated that Mertes was explicit: "he said that it had never been negotiated in the contract."

Tolsen also testified that it was Mark Francis who kept asking was it company policy for the Indianapolis plant to not have a 401(k). He said Francis used the term company policy or corporate policy: Mertes did not. Tolsen testified that Mertes did not say that employees would not be permitted to participate in 401(k), if they selected the Union as a bargaining representative nor did he promise that the employees would be permitted to participate in a 401(k) plan or receive other benefits if they did not support the Union. ¹⁰

Mertes denied making any statement at the 3 p.m. meeting regarding company policy or saying that it was against company policy to have a 401(k) plan in a union plant. Rather, he testified that he told the employees that a plan had not been negotiated in the contract. For demeanor, and other reasons, I credit Mertes' testimony, which was substantially corroborated by the testimony of Smith, Tolsen, and Nealy. I credit Tolsen's unrebutted testimony that Francis introduced the terms "corporate policy" or "company policy" into the dialogue by repeatedly asking if it was against company policy to have a 401(k) at the Indianapolis plant.

c. Analysis and findings

In assessing the statements made by Mertes on January 7, it is important to keep in mind the context and manner in which the statements were made. The evidence shows that in his prepared presentation. Mertes did not disparage the Union, that he made a disclaimer statement about not being able to promise anything, and that he gave an overview of the wages and benefits available in nonunion plants, rather than a detailed comparison between union and nonunion plants. The evidence shows in the course of answering employees' questions, Mertes also repeatedly stated that he could not promise anything because it was illegal to do so and that he emphasized that in a unionized plant wages and benefits, including a 401(k) plan, must be negotiated into a contract. Finally, the evidence shows that whenever the current or former Union representatives brought up the fact that the Union had unsuccessfully attempted to obtain a 401(k) plan in prior negotiations, Mertes did not foreclose the possibility of that occurring in the future, rather he stated that "everything was negotiable."

With respect to the comments at the 6 a.m. meeting, which give rise to the alleged violation, the evidence shows that they were not made by Mertes, but were made by employee Terry Beavors, in the course of disputing Mertes' explanation that the Indianapolis plant did not have a 401(k) plan because it had not been negotiated in prior negotiations. Mertes effectively refuted Beavers' assertions when he explained to the employees that the Respondent did not agree to the Union's contract proposal because it did not want to become involved in administering a union sponsored plan and did not want to negotiate investments with a third party. I credit Mertes' testimony denying that he ever told anyone that it was against company or corporate policy to have a 401(k) plan in a union plant, and I credit the corroborating testimony of Smith and Phelps. Far less probative is the second hand account given by Garmon of the statements

⁹ Howard testified that he attended two meetings on January 7, the first of which was held at 2 p.m. He testified that at the 2 p.m. meeting, Mertes stated that he was going to give them the facts about how non-union plants operate. Howard testified that Mertes told the employees about a nonunion business forms plant in Chicago, Illinois, that had comparable, if not better, wages and benefits than the Indianapolis plant, including a company-sponsored 401(k) plan. According to Howard, Mertes stressed that all nonunion plants have 401(k) plans.

¹⁰ Peter Cooper, who worked in shipping, testified that he attended the "A" shift meeting on January 7. He stated that when someone asked if the employees were going to get a 401(k) plan, Mertes said that he could not promise them a 401(k) plan. Cooper also stated that Mertes did not mention the words "corporate policy" or "company policy."

attributed to Mertes by Beavers, which purportedly were made three years earlier in contract negotiations. ¹¹ In any event, the evidence shows that Mertes told the employees that "everything is negotiable" which left open the possibility that a 401(k) might be obtained in negotiations.

The evidence further discloses that at the 3 p.m., Mertes likewise emphasized that wages and benefits in a union plant had to be negotiated. Specifically in response to questions about why the Indianapolis plant did not have a 401(k) plan, Mertes explained that it had not been negotiated, which was an accurate statement of fact. Union President Howard and past Union Representative Francis disputed his explanation by telling the employees their version of what occurred during negotiations. Mertes effectively denied their account when he testified that he did not state that there was a corporate or company policy against having a 401(k) plan in a unionized plant. His testimony was corroborated by others who attended the same meeting. Even so, the comments on which the alleged violation is based, whether they were accurate or not, were not made by Mertes, but were made by the current and past union officials, and cannot be attributed to him. 12

As to Mertes' comment that all nonunionized plants have a 401(k) plan, I find that it was a statement of fact, which he was entitled to make under Section 8 (c) of the Act. In the context of a decertification case, the Board has held that "[i]t is not unlawful to hold a meeting to inform employees of the wages and benefits enjoyed by its nonunion employees, so long as it does no more than truthfully describe the wages and benefits of its other employees and does not make any implied promises that the wages and benefits of the employees at the meeting will be adjusted if the union is voted out." Lepel Corp., 323 NLRB 841 (1997) citing, Fabric Warehouse, 294 NLRB 189 (1989). Contrary to allegations in the complaint, the evidence viewed as a whole establishes that at the January 7 meetings, Mertes did not expressly or impliedly inform the employees that they would not be permitted to participate in a 401(k) plan if they selected the Union as their bargaining representative. Nor did he expressly or impliedly promise the employees that they would be permitted to participate in a 401(k) plan or that they would receive other benefits, if they ceased to support the Union. Rather, the evidence shows that Mertes carefully prefaced his prepared remarks, explained that unionized benefits had to be negotiated, repeatedly stated that he could not promise anything and told the employees that "everything was negotiable." His statement indicates that a 401(k) plan was a subject for negotiation, but does not suggest that bargaining unit employees are automatically and irrevocably foreclosed from participating in such a plan simply because they are represented by a union. See *Kezi, Inc.*, 300 NLRB 594, 595 (1990).

Accordingly, I shall recommended that the allegations of paragraph 5(a) as they pertain to the January 7 meeting be dismissed

3. The January 23 meeting

Towards the end of the January 7 meeting, employee Don Bollinger asked Mertes for more information about the benefits received by nonunion employees. He specifically wanted to hear from employees who had worked in a union plant that had gone nonunion. Mertes responded by having the plant manager and two hourly employees from the Lincoln, Illinois plant attend the January 23 meeting. He also had available for review copies of the Lincoln plant employee handbook and the plant's former collective-bargaining agreement. Mertes testified that he began all three-shift meetings the same way. He introduced the hourly employees, told everyone that it would be an open forum to ask questions, and stated that if there was an inappropriate question, he would not allow it to be answered.

a. The 6 a.m. meeting

Gamon testified that at the January 23 meeting, Mertes introduced the Lincoln plant employees, who talked about their experiences with and without a union. They were asked if they received wage increases and a 401(k) after decertification to which they responded, "yes." According to Garmon, Mertes again was asked if all nonunion plants had a 401(k) and he said, "yes, it was available to them." (Tr. 103.) Gamon said that the Indianapolis plant employees at the meeting were given the option of taking an employee handbook and a copy of the prior Lincoln collective-bargaining agreement.

Phelps testified that at the 6 a.m. meeting, the Lincoln plant employees talked about their jobs after decertification. Someone asked Mertes if the Indianapolis plant would get a 401(k) plan and he stated that the company could not promise anything. Phelps testified that Mertes said that the Company could not promise anything numerous times during the meeting. Phelps said that it was mentioned that during the 1994 contract negotiations the Union tried to bargain with the company about a 401(k) plan, but "that was one of the things that was cut." (Tr. 241.) Phelps also testified that Mertes said that negotiating a 401(k) plan was difficult because there are so many different plans with a 401(k). But according to Phelps, Mertes did not say that there would never be a 401(k) plan at a union plant or words to that effect. Nor did he say anything about a company policy or corporate policy against having a 401(k) at a union plant.

b. The 3 p.m. meeting

Former Union Representative Mark Francis gave a generalized account of what took place at the 3 p.m. meeting on January 23. He said that after Mertes made some brief introductory remarks, the Lincoln plant employees answered questions. He testified that the 401(k) plan, seniority, insurance, and other benefits were mentioned, but he did not say by whom or to what extent.

¹¹ Beavers did not testify at the hearing. The statement attributed to him by Garmon is therefore hearsay, which was objected to by Respondent's counsel, but allowed into evidence because arguably the statement was not going to be relied on for the truth of the matter asserted. In retrospect, that is the sole reason for which the statement is relied on and therefore I give no weight to Beavers' statement, which should have been excluded. As to Garmon's testimony that Mertes acknowledged to him the accuracy of Beavers' statement, even if I credited Garmon's testimony, which I do not, it still would be hearsay within hearsay not within any exception and therefore I give it no weight. Additionally, for demeanor reasons, I do not credit Garmon's account of what Beavers said or his testimony that Mertes allegedly acknowledged the accuracy of Beavers' statement.

The evidence supports a reasonable inference that Howard and Francis may have purposely interjected objectionable remarks into the dialogue because Nealy testified that before the January 7 meetings, Union President Huggins phoned him at home, told him to ask questions at the meeting, and told him to tell Mark Francis to do the same. The dialogue may very well have been contrived in light of Tolsen's testimony that Francis, not Mertes, used the terms "corporate policy" or "company policy" in the discussion by repeatedly asking if it was against corporate policy to have a 401(k) plan at the Indianapolis plant.

Union Shop Steward Mark Howard attended the same meeting. He testified that one of the Lincoln hourly employees spoke about their union president taking money from the union, which prompted Howard to ask the former union member why he allowed that to happen. According to Howard, Mertes stressed that all nonunion plants participated in a 401(k) plan. Howard conceded that Mertes also said that he could not promise anything in regard to a 401(k) and that Mertes never urged the employees to vote for or against the Union in the decertification election.

Nealy testified that when he brought up the 401(k) plan at the 3 p.m. meeting, Mertes told him that they had talked about it at the last meeting and that he was not going to get into it again. Cooper testified that after the Lincoln plant employees said that they had received a 401(k) plan, someone asked if the Indianapolis plant was going to get a plan, and Mertes said that he could not make any promises.

c. Analysis and findings

The evidence shows that the January 23 meetings were open forums, arranged by Mertes in response to an employee's request to hear from hourly employees who had gone through the decertification process. The evidence also shows that after making some preliminary remarks, Mertes turned the meeting over to the Lincoln plant employees, who answered most of the questions. When Nealy started asking Mertes questions about the 401(k) plan, he told him that it had been discussed enough at the previous meeting. The evidence shows that Mertes' remarks at the January 23 meeting were limited and guarded and that he reminded the employees over again that he could not make any promises. As to the employee handbook and copies of the prior collective- bargaining agreement at the Lincoln plant, the evidence discloses that the items were made available to the employees, but that the employees were not required to take a copy and that some did not. Also, there is no evidence that Mertes or any of the Lincoln employees reviewed the documents with the Indianapolis employees or otherwise spent time explaining in detail the benefits available to nonunionized employees.

I find that the General Counsel has failed to adduce sufficient proof that the employees were told at the January 23 meeting, expressly or impliedly, that if they voted for the Union they would not receive a 401(k) plan or that if they voted against the Union they would receive such a plan. I therefore shall recommend that the allegations of paragraph 5(a), as they pertain to the January 23, 1997 meeting, be dismissed.

D. The Refusal to Bargain and Withdrawal of Recognition

1. The refusal to bargain

On March 3, Huggins wrote a letter to Smith reminding him that in December 1996, Mertes had set aside the week of March 10, 1997, for contract negotiations with the Union, and advising Smith that he was available on that date, as well as March 11, 12, and 13, for negotiations. Smith forwarded the letter to Mertes, who by letter dated March 5, responded that "[t]he Company respectfully declines your request to negotiate with Local 17M at this time because the Company has a good faith reason to doubt the Union's majority status based on the recent elections results." (G.C. Exh. 11.) On April 15, which was one week after the Union filed a charge alleging a refusal to bargain, Huggins wrote to Smith again requesting to begin negotiations. The Respondent did not respond to that letter. By letter to Smith, dated June 9, Huggins made another

to Smith, dated June 9, Huggins made another unsuccessful request to begin bargaining. Mertes responded on June 12 that the Company would negotiate in good faith "if the decision is in fact made by the appropriate adjudicating body that the Complaint issued by the Board has merit."

It is established Board law that an employer has a statutory obligation to bargain with a union, which ostensibly has lost a decertification election until the certification results issue. W. A. Krueger Co., 299 NLRB 914, 916 (1990). The Board has held that "an incumbent union is entitled to be treated as the employees' bargaining representative until a final determination is made that the union is no longer the employees' representative." Id. I therefore find that the Respondent violated the Act by refusing the Union's request to begin bargaining made on March 3, 1997, and on various dates thereafter.

Despite the above-cited Board precedent, the Respondent points out that judicial decisions have held that an employer is entitled to rely on uncertified election results in refusing to bargain with the Union. Specifically, the Respondent cites Selkirk Metalbestos, N.A. v. NLRB, 116 F.3d 782 (5th Cir. 1997), where the Fifth Circuit Court of Appeals found that uncertified election results provided a sufficient objective basis for an employer's good faith doubt that the union no longer represented the majority of the employees, thereby relieving the employer of its duty to bargain under the Act. 116 F.3d at 790. See also St. Agnes Medical Center v. NLRB, 871 F.2d 137, 147 (D.C. Cir. 1989), enfg. in part, reversing in part, and remanding in part St. Agnes Medical Center, 287 NLRB 242 (1987), supplemental decision 304 NLRB 146 (1991), not cited in either posthearing brief filed with me. But, "[t]he Board takes the view that an Administrative Law Judge's duty is to apply established Board precedent which the Supreme Court of the United States has not reversed, despite reversal of Board precedent by courts of appeals." Ford Motor Co. v. NLRB, 571 F.2d 993, 986 (7th Cir. 1978), affd. 441 U.S. 448 (1979); but see Pyramid Management Group, Inc., 318 NLRB 607, 609-610 (1995). And because one cannot accurately predict which court of appeals (if any) would review the instant case, given the venue provisions of Section 10(e) and (f) of the Act, I decline to follow those judicial decisions, and instead rely solely on existing Board law.

Acknowledging that the Board does not necessarily follow circuit court decisions, the Respondent alternatively argues that the present case is distinguishable from *Selkirk* because it never withdrew recognition from the Union. The Respondent points out, and the evidence shows, that the parties' contract was never terminated and that the Respondent has adhered to all of its terms and conditions. But even if that is true, it does not legitimize the Respondent's unlawful refusal to bargain which constitutes a separate and distinct violation of the Act.

The Respondent also argues that because the agreement to enter into a stipulated election agreement in exchange for waiving the right to file exceptions is enforceable under Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), it therefore constitutes a valid defense to the alleged violation of Section 8(a)(5). The Respondent theorizes that because the Union agreed to hold a rerun election, and at the same time did not ask to bargain, the Respondent had a reasonably grounded doubt of the Union's majority status and therefore could refuse to bargain. I am unpersuaded by the agreement. The agreement in exchange for a waiver in essence was made in order to obtain an expedited election. There is

nothing on the face of that agreement or in the stipulated election agreement, which constitutes a waiver of the Union's statutory right to bargain. Nor does either of the agreements constitute a concession by the Union that it no longer represents a majority of the bargaining unit employees.

Based on extant Board law, therefore, I find that the Respondent unlawfully refused to bargain with the Union on March 5, 1997, and at all times thereafter in violation of Section 8(a)(5) of the Act.

2. The alleged withdrawal of recognition

Paragraph 7(c) of the complaint alleges that on March 5, 1997, the Respondent unlawfully withdrew recognition of the Union. However, the evidence shows that at a hearing held on March 14, on the objections to the election, the Respondent agreed that while the issue of representation was pending it would continue to adhere to all terms of the contract that was due to expire the next day. As the hearing ended, Union Attorney Groth asked Mertes if the Respondent was going continue the contract in effect. According to Mertes' unrebutted testimony, he told Groth that the contract would remain in effect, that the Respondent was not going to make any unilateral changes, and that it was not going to withdraw recognition from the Union while the question of representation was pending. The evidence further discloses that prior to the expiration date and since March 15, the Respondent has adhered to the terms of the contract, including the payment of monies into the pension, health and welfare funds, dues deductions, and the grievance procedure. The evidence also discloses that by letter, dated March 18, 1997, the Union gave the Respondent permission to grant wage increases and benefits enhancements, and that subsequent thereto the Respondent granted a 3-percent wage increase and an additional paid holiday, which are the only changes to the contract made by the Respondent. Thus, while the Respondent continues to doubt the Union's majority status, and continues to refuse to bargain with the Union, it nevertheless has adhered to the contract and has recognized the Union as the exclusive representative of the unit members in connection the administration of the contract.¹¹

I therefore find that the evidence when viewed in its entirety does not support the allegation that the Respondent withdrew recognition of the Union. Accordingly, I shall recommend that the allegations of paragraph 7(c) of the complaint be dismissed.

E. The Alleged Unlawful February Memos

In paragraph 5(b) of the complaint, as amended, the General Counsel alleges that the Respondent violated Section 8(a)(1) of the Act by posting a memorandum on February 7, 1997, informing its employees that they would not receive a wage increase and other benefits, if they supported the Union and by posting a memorandum on February 18, 1997, promising its employees that they would receive wage increases and other benefits, if they ceased to support the Union.

The February 7 memorandum began by giving the results of the election tally and then stated, in pertinent part:

Since the GCU Union failed to receive a majority of the total votes Cast, the GCU will no longer be your representative after March 15, 1997.

If no protests to the election are filed, the National Labor Relations Board (NLRB) will issue an election certification within seven days. If a protest is filed by the GCU Union, then this election certification may be delayed while the NLRB investigates the charges. Once the the election results have been certified by the NLRB, the company can announce wage rate increases for 1997 and other benefits enhancements.

The Company will continue to abide by the terms of the current labor Contract through March 15, 1997. An Employee Handbook for the Indy Forms Plant will be developed to replace the contract. [G.C. Exh. 20.]

The February 18 memorandum explained that on February 13, the Union filed objections to the election which were being investigated by the Board and then stated, in pertinent part:

Until the NLRB certifies the election, the company can not announce any wage rate or other benefit enhancements. The company will continue to abide by the terms of the current labor contract. We will cooperate fully with the NLRB to try to bring a speedy resolution to the protest.

The General Counsel argues at pp. 37–38 of its brief that the memos violate Section 8(a)(1) of the Act because they "imply to the employees that there are wage increases and benefits 'waiting in the wings' so to speak, and these will be awarded if the employees cease their support for the Union (if the decertification results are certified), or these will be withheld if the employees continue to support the Union (if the decertification election results are not certified)."

Considering the timing of the memoranda and their content, I find that neither document contains an implied threat to withhold or an implied promise to grant a specific and substantial benefit which necessarily would interfere with the employees' free choice in the decertification process.¹⁴ First of all, the February 7 memo was not posted until after the decertification election and therefore it could not have had any influence (positive or negative) on the election outcome. As to the memo's possible effect on a rerun election, the evidence shows that there were no objections pending at the time, nor was there an inkling that another election might be held in the immediate future. Thus, the likelihood that the memorandum was calculated to influence or could influence a future election voting is remote. Next, when read in context, the February 7 memo sufficiently points out that everything depends on the certification of the election results, thereby negating any impression that the granting of wage increases and benefits was a foregone conclusion. Finally, the February 7 memo does not mention any specific improvement or give a concrete example of a benefit

¹³ Contrary to the General Counsel's assertions, I do not find that a different conclusion is warranted by Smith's memo to the employees, dated February 7, 1997, where, in the context of discussing the election results, he states that since the "Union failed to receive a majority of the total votes cast, [it] will no longer be your representative after March 15, 1997." (G.C. Exh. 20.) I find that the Respondent's conduct in adhering to all terms of the contract is a better indicator of its stated intent to continue to recognize the Union until the question of representation is finally resolved.

¹⁴ Had the complaint alleged, and the General Counsel argued, that the memoranda violated Sec. 8(a)(5) on the grounds that they were calculated to undermine and bypass the Union as the exclusive bargaining representative, a basis may have existed for finding a violation of the Act. But those allegations and that argument have not been made nor fully litigated and therefore I am confined to consider the evidence in the context of whether the Respondent's conduct violates Sec. 8(a)(1) of the Act.

which the employees might receive if they supported the decertification effort or vice versa.

With respect to the February 18 memo, the evidence reflects that it was issued only a few days after the objections to the election were filed, but long before a hearing was held on the objections and long before a date was set for a rerun election. It therefore was sufficiently removed in time to negate the possibility of interfering with employee free choice in a rerun election. In addition, the February 18 memo stops short of impliedly promising to grant or impliedly threatening to withhold any specific or substantial benefits and instead explains to the employees that everything is on hold until an investigation of the objections is completed.

Based on the timing and content of the memoranda, I find that they did not interfere with the employees' free choice. *Coverall Rental Service*, 205 NLRB 880 (1973). Accordingly, I shall recommend that the allegations of paragraph 5(b) of the complaint be dismissed.

F. The Request for a "Gissel" Bargaining Order

The General Counsel argues that the Respondent's conduct is so serious and substantial in character that a bargaining order pursuant to NLRB v. Gissel Packing Co., 395 U.S. 575, 610-616 (1969), is warranted with no rerun election. I do not agree. The unlawful refusal to bargain was not so extraordinary that its effects cannot be erased by the use of traditional remedies and at the same time resolve the representation question raised by the decertification petition by a fair Board rerun election. Under similar circumstances, the Board has found that an affirmative bargaining order with a rerun election is an appropriate traditional remedy, separate and distinct from the extraordinary remedy of a Gissel bargaining order to the exclusion of a rerun election. See Angelica Corp., 276 NLRB 617, 617 fn. 2 (1985). I therefore find that the employees' free choice in this case can be best ascertained by holding of a rerun election and, in addition, I shall recommend that the Respondent be required to bargain with the Union, on request.

CONCLUSIONS OF LAW

- 1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. The Union is a labor organization within the meaning of Section 2(2) of the Act.
- 3. All production and maintenance employees, truck drivers, warehouse and all other employees employed by the Respondent at its Indianapolis, Indiana facility; BUT EXCLUDING all office clerical employees, professionals, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
- 4. At all times material, the Union has been and now is the exclusive representative in the unit for purposes of collective bargaining within the meaning of Section 9(a) of the Act.
- 5. By refusing to collectively bargain with the Union from March 3, 1997, through the present, and while the final resolution of the question concerning the representative status of the Union raised in Case 25–RD–1279 was pending, the Respondent engaged in and continues to engage in conduct which violates Section 8(a)(1) and (5) of the Act.
- 6. The Respondent did not otherwise engage in any other unfair labor practices alleged in the complaint in violation of the Act.

REMEDY

Having found that the Respondent violated Section 8(a)(1) and (5) of the Act, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I shall recommend that the Respondent be ordered to bargain collectively with the Union as the representative of the Respondent's unit employees. This order is not to be construed as requiring rescission of the wages and benefits granted subsequent to the February 7, 1997 election. I shall also recommend that at second election be held.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁵

ORDER

The Respondent, Willamette Industries, Inc., Indianapolis, Indiana, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Failing and refusing to bargain in good faith with the Union as the exclusive bargaining representative agent of its employees in the appropriate bargaining unit consisting of all production and maintenance employees, truck drivers, warehouse and all other employees employed by the Respondent at its Indianapolis, Indiana facility; BUT EXCLUDING all office clerical employees, professionals, guards and supervisors as defined in the Act.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) On request, bargain in good faith with the Union as the exclusive bargaining representative of employees in the above appropriate unit and, if an understanding is reached, embody that understanding in a signed agreement.
- (b) Within 14 days after service by the Region, post at its facility in Indianapolis, Indiana, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 3, 1997.
- (c) Within 21 days after service by the Region, file with the Regional Director sworn certification of a responsible official

¹⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board"

on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that Case 25–D–279 be reopened, that all prior proceedings held thereunder be reinstated, and that a rerun election be held.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected conerted activities

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain in good faith with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All production and maintenance employees, truck drivers, warehouse and all other employees employed by the Respondent at its Indianapolis, Indiana facility; BUT EXCLUDING all office clerical employees, professionals, guards and supervisors as defined in the Act.

WILLAMETTE INDUSTRIES, INC.